UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| CLAUDIA DIBLASI,<br><br>Plaintiff<br><br>v.<br><br>LIBERTY MUTUAL GROUP INC.,<br><br>Defendant. | CIVIL ACTION NO. 1:12-cv-10967-RGS |

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiff Claudia DiBlasi worked as a Senior Product Analyst for defendant Liberty Mutual Group Inc. for over two and a half years. During that time, DiBlasi regularly failed to meet deadlines, and produced reports that were riddled with inaccuracies. What is more, she routinely failed to provide the kind of high-level analysis and recommendations Liberty Mutual had hired her to provide. Despite being counseled repeatedly about these shortcomings, DiBlasi was unwilling or unable to improve her performance. Accordingly, Liberty Mutual terminated her employment in August 2011. DiBlasi now claims that she was terminated because of her alleged disability and/or in retaliation for taking a leave of absence under the Family and Medical Leave Act. DiBlasi also claims that Liberty Mutual failed to pay her overtime. As discussed herein, DiBlasi has absolutely no evidence to support her discrimination and retaliation claims. Further, Liberty Mutual properly classified DiBlasi as an exempt administrative employee and therefore was not required to pay her overtime. Accordingly, the Court should grant Liberty Mutual's motion for summary judgment and dismiss all of DiBlasi's claims.

## I. BACKGROUND

In January 2009, DiBlasi began working as a Senior Product Analyst in the "state management group" within Liberty Mutual's product organization. Statement of Material Facts ("SMF") ¶ 1. The state management group was responsible for, among other things, ensuring that Liberty Mutual's personal market insurance products (e.g., homeowner's insurance, automobile insurance, etc.) complied with state regulatory requirements and remained competitive in the marketplace. SMF ¶ 2. Liberty Mutual organized the members of the state management group into teams; and each team was responsible for overseeing multiple states.[1] SMF ¶ 3. DiBlasi's team was led by Laura Downey, who held the title of Manager of Product Analysis. SMF ¶ 9.

Although DiBlasi had multiple responsibilities in her role as a Senior Product Analyst,[2] the most important aspect of her job was to analyze and research internal data and market trends for personal insurance products in her assigned states to ensure that Liberty Mutual achieved strong results in those states and its products remained competitive. SMF ¶ 10. Liberty Mutual expected that DiBlasi's reports would include not just an identification of trends, but also an analysis of the causes of those trends and recommendations as to whether and how Liberty Mutual should respond to them, e.g., by charging a different rate for a specific type of coverage. SMF ¶ 18. Relatedly, DiBlasi was responsible for monitoring changes in state regulatory

[1] Each team consisted of multiple Product Analysts and/or Senior Product Analysts. SMF ¶ 4. The teams were supported by actuaries and/or student actuaries. SMF ¶ 5. Each team worked closely with the Director of State Operations ("DSO") for each state that the team was responsible for supporting. SMF ¶ 6. DSO's, in turn, had overall responsibility for Liberty Mutual's personal markets business within a specific state(s). SMF ¶ 7. Thus, the state management team provided research, analysis, and recommendations to the DSO on how to respond to changes in the market within a state. SMF ¶ 8.

[2] Liberty Mutual assigns jobs a numerical grade, based on the job's duties and their significance, as well as the experience and credentials required of qualified candidates, among other things. SMF ¶ 11. DiBlasi was qualified for the grade 15 job of Senior Product Analyst because of her many years of experience in the insurance industry and her actuarial background. SMF ¶¶ 14-16. Based on the job grade and DiBlasi's qualifications, Liberty Mutual expected that she would be able to perform at a high-level, e.g., by providing well researched and thoughtful analysis and recommendations that could then be evaluated and acted on by senior members of management. SMF ¶ 17.

requirements and identifying actions Liberty Mutual needed to take in response to those requirements.[3] SMF ¶19.

### A. DiBlasi's Initial Performance Problems

Although Downey initially thought that DiBlasi was an adequate performer, she soon became concerned about her work. SMF ¶ 23. DiBlasi worked slowly and had difficulty meeting deadlines, even on relatively simple projects. SMF ¶ 24. Moreover, on one occasion, DiBlasi submitted a report that failed to contain critical information and therefore was unusable. SMF ¶ 25.

Specifically, DiBlasi was responsible for preparing a document that needed to be filed with the State of Washington in connection with a proposed rate change. SMF ¶ 26. DiBlasi, however, submitted a document to Downey that was incomplete. SMF ¶ 27. Compounding the problem, DiBlasi had left for vacation immediately after submitting the document. SMF ¶ 28. As a result, Downey and one of her colleagues were forced to finish this project. SMF ¶ 29. After DiBlasi returned from vacation, Downey told her that this type of conduct was completely unacceptable and that she needed to communicate with Downey if she anticipated any difficulty in meeting deadlines. SMF ¶ 30.

As a result of these particular performance issues, DiBlasi developed a strained working relationship with Denise Kelly, the DSO for Washington, one of the three states for which DiBlasi was responsible. SMF ¶ 31. Rather than discipline DiBlasi, however, Liberty Mutual decided to assign different state responsibilities to DiBlasi. SMF ¶ 32. As a result, DiBlasi began reporting to a new manager, Gifford Sommerkamp, in September 2009. SMF ¶¶ 32-33.

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[3] Different states impose different requirements upon insurance companies. For example, in some states, a rate increase must be approved by the relevant state agency before it can be implemented. To request such an increase, an insurance company generally must submit a detailed proposal explaining the basis for the request. In other states, insurance companies simply notify the state of an upcoming rate increase. See SMF ¶ 20-22.

### B. DiBlasi's Performance Problems Continue After She Begins Reporting To Sommerkamp

Unfortunately, DiBlasi's problems with accuracy and timeliness continued under Sommerkamp. For example, in November 2009, DiBlasi was asked to analyze the rate at which Liberty Mutual was retaining its automobile insurance customers in Colorado, New Mexico, and Oklahoma (the three states for which DiBlasi was then responsible), but she failed to meet the deadline for completing that project. SMF ¶ 34. Indeed, DiBlasi's progress was so slow that Sommerkamp had to ask one of her colleagues to perform the analysis for Colorado. SMF ¶35.

In addition to her problems with timeliness and accuracy, Sommerkamp soon noticed that DiBlasi's reports often failed to contain the expected level of analysis. SMF ¶ 36. For example, DiBlasi regularly failed to evaluate the root causes of, and provide recommendations on how Liberty Mutual should respond to, various issues (e.g., a decrease in market share within a specific state). SMF ¶ 37.

These performance problems were reflected in DiBlasi's annual review for 2009.[4] SMF ¶ 38. In his written comments on the review form, Sommerkamp noted that DiBlasi needed to develop "an increased sense of urgency [and] focus more on the detail of her work products to reduce the number of errors in her work." SMF ¶ 44. In addition to working on her time management skills, Sommerkamp reminded DiBlasi of the need to supplement her work with additional recommendations and analysis. SMF ¶ 45. He specifically asked her to put "extra effort into her analysis and ensuring the accuracy of her data and recommendations" going forward. SMF ¶ 46. In light of the concerns raised by both Sommerkamp and Downey, DiBlasi

[4] Liberty Mutual's annual performance evaluations are referred to as Objective Setting and Performance Evaluations ("OSPE's"). SMF ¶ 39. The OSPE form identified seven different performance objectives that Liberty Mutual expected DiBlasi to attain in the course of her job duties. SMF ¶ 40. As DiBlasi's manager, Sommerkamp was responsible for preparing the OSPE and discussing it with her. SMF ¶ 41. In the course of doing so, he had multiple conversations with Downey regarding DiBlasi's performance during the first part of 2009. SMF ¶ 42. Accordingly, the final OSPE reflects the observations of both Downey and Sommerkamp. SMF ¶ 43.

received a low overall performance rating.[5] SMF ¶ 47.

Despite this feedback, DiBlasi continued to have problems with accuracy, timelines, and analysis throughout 2010. SMF ¶ 50. Moreover, even when DiBlasi did complete projects, she regularly failed to provide the type of high-level analysis and recommendations that Liberty Mutual expected to receive from a grade 15 analyst. SMF ¶ 51. Accordingly, Sommerkamp had a number of meetings with DiBlasi in which he discussed his ongoing concerns with her performance. SMF ¶ 52.

In the summer of 2010, DiBlasi requested and received a multi-week leave of absence under the Family and Medical Leave Act (the "FMLA") to have, and recover from, orthopedic surgery on her leg. SMF ¶ 53. She returned to work at the end of August, 2010.[6] SMF ¶ 54.

Unfortunately, DiBlasi's performance problems continued after she returned from her FMLA leave. SMF ¶ 57. For example, in November she failed to meet a deadline for completing a presentation regarding Liberty Mutual's conversion rate in New Mexico. SMF ¶ 58. Moreover, the presentation she ultimately completed did not contain any recommendations or conclusions. SMF ¶ 59.

In light of DiBlasi's ongoing performance problems, Sommerkamp met with DiBlasi in early December 2010 to provide her with an informal development/performance plan. SMF ¶ 60. The purpose of this plan was to reiterate the various concerns that Sommerkamp had with DiBlasi's performance and to provide her with examples of how to address those concerns going forward. SMF ¶ 61. In addition to reminding DiBlasi about the need to hit deadlines and provide accurate work product, Sommerkamp reiterated that DiBlasi was expected to "bring business problems to the DSO and help set the strategy up" for her assigned projects. SMF ¶ 62. Thus, for example, when completing a "state of the state" review, DiBlasi should do more than just recite data, but instead should identify her top three to six findings (e.g., positive or negative trends) and provide analysis and recommendations for addressing those findings (e.g., increasing marketing efforts towards specific populations, altering rates, or simply identifying a trend as something that should be closely monitored going forward). SMF ¶ 63.

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[5] DiBlasi received an overall rating of 95 on a scale of 75-125. SMF ¶ 48. On that scale, a rating between 90 and 96 signifies that the employee met some, but not all, of the applicable objectives and, as a result, made a mixed or inconsistent contribution to Liberty Mutual's business. SMF ¶ 49.

[6] This is the only FMLA leave DiBlasi ever requested from Liberty Mutual. SMF ¶ 55.

Approximately six weeks later, Sommerkamp met with DiBlasi to discuss her annual performance review. SMF ¶ 64. Once again, DiBlasi received a low overall performance rating of 95. SMF ¶ 65. Consistent with their prior discussions, Sommerkamp told DiBlasi that she needed to focus on meeting deadlines and "providing sound conclusions/recommendations in her analysis." SMF ¶ 66.

**C. DiBlasi Receives A Written Warning**

Later that same month, Sommerkamp contacted Kate Skelly of Liberty Mutual's human resources department. SMF ¶ 67. Sommerkamp told Skelly that, in light of DiBlasi's poor performance in the approximately 15 months that she had been reporting to him, and her recent failure to achieve the goals he had laid out in the informal development plan, he had decided to issue her a formal written warning. SMF ¶ 68. Skelly agreed and subsequently worked with Sommerkamp to draft an appropriate written warning. SMF ¶ 69.

On February 18, 2011, Sommerkamp met with DiBlasi to deliver the warning. SMF ¶ 70. In the warning, Sommerkamp identified the areas in which DiBlasi's performance had been deficient (e.g., failure to meet deadlines and provide accurate reports), provided specific examples of her shortcomings, and gave concrete examples of things she could do to improve her performance. SMF ¶ 71. He told her that they would meet on a weekly basis to discuss these issues over the next 30 days. SMF ¶ 72. The warning provided that if DiBlasi's performance did not improve during the 30-day warning period, "further job action may be taken up to and including immediate termination of employment." SMF ¶ 73.

DiBlasi, however, continued to perform poorly during the 30-day warning period. SMF ¶ 74. For example, her reports during this timeframe contained miscalculations and relied upon improper methodology. SMF ¶ 75. Accordingly, on March 11, 2011, ten days prior to the end of the 30-day warning period, Sommerkamp met with Skelly to discuss possible next steps. SMF ¶ 76. Given the continued shortcomings in DiBlasi's work, Sommerkamp told Skelly that he would like to put DiBlasi on probation once the warning period ended on March 21st. SMF ¶ 77. After reviewing his concerns, Skelly agreed that probation was the appropriate next step. SMF ¶ 78.

### D. Liberty Mutual Accommodates DiBlasi's Request For A Reduced Schedule And Workload

On the morning of March 18, 2011 – the last day of the 30-day warning period – DiBlasi sent Sommerkamp a doctor's noting stating that DiBlasi was "unable to work overtime due to ongoing medical problems."[7] SMF ¶ 79. Sommerkamp promptly forwarded the note to Skelly so that she and her colleagues could coordinate the process of understanding, and attempting to accommodate, DiBlasi's request. SMF ¶ 83.

Shortly thereafter, Sommerkamp and Skelly met with DiBlasi to discuss her accommodation request. SMF ¶ 84. Skelly provided DiBlasi with a consent form so that appropriate Liberty Mutual personnel could speak with, and obtain information from, her doctor as part of the accommodation process. SMF ¶ 85. Among other things, Liberty Mutual needed to know what specific limitations her doctor was proposing with regard to DiBlasi's work hours and how long those limitations would need to remain in place. SMF ¶ 86. Skelly and Sommerkamp also explained to DiBlasi that the performance management process would be placed on hold (i.e., she would not be placed on probation) until her accommodation request had been addressed appropriately. SMF ¶ 87.

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[7] The doctor's note did not identify the nature of DiBlasi's "medical problems" and DiBlasi never disclosed the nature of those problems to Sommerkamp. SMF ¶¶ 80-81. He only learned of these alleged problems (complications arising from the medications she took to address endometriosis and an immune deficiency) after DiBlasi initiated litigation. SMF ¶ 82.

After some back and forth, DiBlasi's doctor ultimately informed Liberty Mutual that he believed DiBlasi should only work five hours per day, four days per week, with possible telecommuting; and this accommodation should be in place at least through the end of June. SMF ¶ 88. DiBlasi agreed with her doctor's recommendation and also requested a longer turn-around time for her projects. SMF ¶ 89.

On June 14, 2011, Skelly and Sommerkamp met with DiBlasi to confirm that Liberty Mutual would grant her requested accommodation. SMF ¶ 90. Based on the performance problems that pre-dated her accommodation request, they also notified her that she was being placed on probation for the upcoming 30 days. SMF ¶ 91.

Shortly thereafter, DiBlasi's doctor informed Liberty Mutual that the requested accommodations should remain in place through end of July, at which point he would re-evaluate her condition. SMF ¶ 92. Skelly subsequently met with DiBlasi to inform her of the Company's willingness to extend the accommodation. SMF ¶ 93.

### E. Liberty Mutual Places DiBlasi On Probation And, Ultimately, Terminates Her Employment Because Of Her Continued Poor Performance

After June 14, 2011, despite having the benefit of the requested accommodations, DiBlasi continued to exhibit the same performance problems that had plagued her during the preceding two years. SMF ¶ 94. For example, she missed multiple deadlines, delivered inaccurate or incomplete reports, and failed to provide the expected level of analysis.[8] SMF ¶ 95. Although DiBlasi failed to improve her performance by July 14, 2011, the scheduled end of the probationary period, Sommerkamp, in consultation with Skelly, nonetheless decided to extend the probationary period by an additional two weeks. SMF ¶ 99. At the end of that time, Sommerkamp, after consulting with Skelly and others, decided to terminate DiBlasi's employment because of her continued poor performance. SMF ¶ 100. Her last day of employment was August 1, 2011. SMF ¶ 101.

### F. DiBlasi Initiates This Lawsuit

DiBlasi subsequently brought this lawsuit. She currently asserts five claims against Liberty Mutual. In Counts I and II of her Second Amended Complaint, DiBlasi alleges that Liberty Mutual failed to pay her overtime, thereby violating the Massachusetts Overtime Law and the Fair Labor Standards Act (the "FLSA"), respectively. In Count III, DiBlasi alleges that Liberty Mutual violated the FMLA by retaliating against her for taking a leave of absence in 2010. Lastly, in Counts IV and V, DiBlasi alleges that Liberty Mutual discriminated against her on the basis of her alleged disability (complications arising from the medications she took to address endometriosis and an unrelated immune deficiency), thereby violating Massachusetts General Laws Chapter 151B and the Americans with Disabilities Act (the "ADA"). As discussed below, these claims are meritless.

## II. ARGUMENT

Summary judgment is appropriate where, as here, the pleadings, "depositions . . . affidavits . . . interrogatory answers or other materials" show that "there is no genuine issue as to

[8] For example, her presentation regarding retention rates in New Mexico contained multiple errors and failed to address critical data. SMF ¶ 96. Moreover, rather than analyze the data to develop her own recommendations about how Liberty Mutual should address certain concerns in New Mexico, DiBlasi simply copied and pasted examples of recommendations from other states that Sommerkamp had previously provided to her. SMF ¶ 97. Similarly, her "state of the state" presentation for Oklahoma failed to discuss the impact of recent storms on Liberty Mutual's business in that state. SMF ¶ 98.

any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. As discussed in detail below, summary judgment is appropriate with regard to all of DiBlasi's claims because she cannot offer any evidence to support her assertions that Liberty Mutual (a) retaliated and/or discriminated against her and (b) failed to pay her overtime that she was entitled to receive. See LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993) ("the nonmoving party must establish a trial-worthy issue by presenting enough competent evidence to enable a finding favorable to the nonmoving party") (internal punctuation omitted); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990) (the nonmoving party must rely on more than "conclusory allegations, improbable inferences, and unsupported speculation" to defeat a summary judgment motion). Each of her claims is addressed in turn.

**A. DiBlasi Fails To State A Discrimination Claim**

DiBlasi first claims that Liberty Mutual issued her a written warning, placed her on probation, and terminated her employment because of her alleged disability, thereby violating the ADA and Chapter 151B. This claim fails because DiBlasi cannot establish that Liberty Mutual's legitimate non-discriminatory reasons for its actions are "mere pretext, cloaking discriminatory animus."[9] Sensing v. Outback Steakhouse of Fla., LLC, 575 F.3d 145, 154 (1st Cir. 2009) (quoting Tobin v. Liberty Mut. Ins. Co. 433 F.3d 100, 105 (1st Cir. 2005)). See Faiola v. APCO Graphics, Inc., 629 F.3d 43, 47 (1st Cir. 2010).

Liberty Mutual plainly had legitimate, nondiscriminatory reasons for disciplining DiBlasi and ultimately terminating her employment, namely, DiBlasi's repeated failure to (a) adhere to deadlines, (b) provide accurate reports, and (c) generate high-level analysis and recommendations. See, e.g., SMF ¶¶ 24-27, 34, 36-37, 50-51, 58-59, 68-75, 94-98, 100; Rios-

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[9] Liberty Mutual assumes, for purposes of this motion only, that DiBlasi can establish a prima facie case of disability discrimination.

Jimenez v. Sec'y of Veterans Affairs, 520 F.3d 31, 42-43 (1st Cir. 2008) (substandard performance is a legitimate, non-discriminatory reason for termination sufficient to defeat discrimination claim). These problems came to light when DiBlasi first joined Liberty Mutual and reported to Downey and continued – despite repeated, documented reminders about the need to improve her performance – during the almost two years that DiBlasi reported to Sommerkamp. See, e.g., SMF ¶¶ 24-31, 34-37. Moreover, these problems continued even after Liberty Mutual granted DiBlasi's request for an accommodation by providing her with a reduced schedule and workload. See SMF ¶¶ 94-100. Thus, there can be no serious dispute that Liberty Mutual had a legitimate, nondiscriminatory reason to discipline DiBlasi and terminate her employment. DiBlasi's alleged disability played absolutely no role in Liberty Mutual's decisions with respect to DiBlasi's employment. SMF ¶ 102. See Sensing, 575 F.3d at 154; Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 57 (2005) (affirming the entry of summary judgment for the employer because the plaintiff presented no evidence to dispute whether or not the employer "truly believed" the legitimate business reasons it proffered for the adverse action in question).

As discussed above, DiBlasi does not have any evidence suggesting that her termination, or any of the events that preceded it, were motivated by discriminatory animus. See Tropigas De P.R., Inc. v. Certain Underwriters at Lloyd's of London, 637 F.3d 53, 56 (1st Cir. 2011) (the non-moving party "must point to competent evidence and specific facts to stave off summary judgment") (internal punctuation and citation omitted). Indeed, it bears noting that DiBlasi's performance problems first came to light in early 2009 when she reported to Downey, two years before she first submitted a doctor's note (in March 2011) requesting an accommodation. See Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 406-07 (2002) (finding that the plaintiff failed to establish a prima facie case of discrimination because his employer's concerns pre-dated the employer's knowledge of his disability). See also, e.g., Hoeppner v. Crotched Mountain Rehab. Ctr., 31 F.3d 9, 14-16 (1st Cir. 1994) (affirming summary judgment where employee was already on probation prior to filing sexual harassment claim); Mole v. Univ. of Mass., 442 Mass. 582, 594 (2004) ("Where, as here, adverse employment actions or other problems with an employee predate any knowledge that the employee has engaged in protected activity, it is not permissible to draw the inference that subsequent adverse actions, taken after the employer acquires such knowledge, are motivated by retaliation.") (internal citation omitted). Those performance problems are documented in her performance evaluations for 2009 and 2010, the development plan that Sommerkamp provided to DiBlasi in December 2010, and the written warning that she received in February 2011; all of which pre-date DiBlasi's request for an accommodation. See SMF ¶¶ 38, 44-48, 60-63, 65-66, 71-73. Indeed, given DiBlasi's failure to improve her performance, Sommerkamp already had decided to place her on probation before receiving her doctor's note in March 2011. SMF ¶¶ 76-78.

Further, because Sommerkamp never even learned of the nature of DiBlasi's alleged disability until the commencement of this lawsuit, he simply could not have acted out of any discriminatory animus with respect to her particular conditions. See Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 41 (1st Cir. 2001) (holding that, in assessing pretext in an employment discrimination case, the "focus must be on the perception of the decisonmaker") (internal citation omitted); Cordoba v. Dillard's Inc., 419 F.3d 1169, 1185 (11th Cir. 2005) ("it is evident that an employee cannot be fired because of a disability unless the decisionmaker has actual knowledge of the disability") (internal punctuation omitted).

In this case, DiBlasi will offer conclusory assertions of discrimination in an attempt to establish pretext, but it is well established that such assertions are insufficient to withstand summary judgment.[10] See Pilgrim v. Trustees of Tufts Coll., 118 F.3d 864, 871 (1st Cir. 1997) ("although . . . [the supervisor's] behavior left [plaintiff] with the perception he had been discriminated against, [plaintiff's] perception is not enough to withstand summary judgment"); Medina-Munoz, 896 F.2d at 8-9. Nor can DiBlasi survive summary judgment simply by disputing Liberty Mutual's business judgment that her performance was inadequate. See Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005) ("pursuant to the 'business judgment' rule an employer is free to terminate an employee for any nondiscriminatory reason, even if its business judgment seems subjectively unwise") (internal citation omitted); Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986) (to establish employment discrimination, plaintiff must show more than "that the employer made an unwise business decision, or an unnecessary personnel move. . . . [or] acted arbitrarily or with ill will").

Because DiBlasi does not have any evidence suggesting that Liberty Mutual's reason for terminating her employment is a pretext for discrimination, the Court should grant Liberty Mutual's motion for summary judgment and dismiss DiBlasi's discrimination claims. See, e.g., Bonefont-Igaravidez v. Int'l Shipping Corp., 659 F.3d 120, 126-27 (1st Cir. 2011) (affirming summary judgment on discrimination claim where plaintiff could not establish pretext).

**B. DiBlasi's FMLA Retaliation Claim Is Meritless**

DiBlasi further alleges that Liberty Mutual retaliated against her because she took a leave of absence under the FMLA in 2010 to have leg surgery. To make out a prima facie case of retaliation, DiBlasi must show that: (1) she engaged in a protected action (e.g., requesting or

[10] For example, DiBlasi has no evidence to support her conclusory allegation that Liberty Mutual failed to accommodate her disability.

taking FMLA leave); (2) she suffered an "adverse employment action;" and (3) there was a causal connection between her protected activity and the adverse employment action. Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 336 n.10 (1st Cir. 2005). If DiBlasi establishes a prima facie case, then Liberty Mutual has the burden of articulating some legitimate, nondiscriminatory reason for the alleged adverse employment action. See id. at 336, n.9 (quoting Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160-61 (1st Cir. 1998)). Once it does so, DiBlasi "retains the ultimate burden of showing that the . . . stated reason for [the employment decision] was in fact a pretext for retaliating against h[er] for having taken protected FMLA leave." Id. at 336, n.9 (quoting Hodgens). DiBlasi cannot sustain her burden with regard to her FMLA claim.

As discussed at length above, Liberty Mutual clearly had legitimate, nonretaliatory reasons for terminating DiBlasi's employment, i.e., her continued poor performance. See Colburn, 429 F.3d at 336. Those performance problems first came to light in 2009, the year before she took her FMLA leave, and are reflected in her performance evaluation for that year.[11] See SMF ¶¶ 23-31, 34-38, 44-48. See also, e.g., Mole, 442 Mass. at 594.

The only "evidence" cited by DiBlasi in support of her claim is her assertion that, when she informed Sommerkamp that she would need to take an extended FMLA leave, he stated that her leave would be "disruptive to projects and to the flow of work" on his team. This true statement – DiBlasi's multi-week leave necessitated that other employees perform the tasks she would have ordinarily handled, thereby disrupting the normal flow of work on Sommerkamp's team – simply cannot be considered as evidence of pretext. See SMF ¶ 56. Instead, even if DiBlasi's allegation is true, Sommerkamp's comment is nothing more than a stray remark, made

[11] DiBlasi has not established any link between her FMLA leave and any subsequent adverse employment action. Therefore, she cannot even establish a prima facie case of FMLA retaliation.

at least seven months before he issued her a written warning and approximately a year prior to her probation and termination. See Rivera-Aponte v. Rest. Metropol #3, Inc., 338 F.3d 9, 12 (1st Cir. 2003) ("The lack of a direct connection between the words and the employment action significantly weakens their probative value."); McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals, 140 F.3d 288, 300-01 (1st Cir. 1998) ("Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight . . .") (internal citation omitted); Straughn, 250 F.3d at 36. This one comment simply is insufficient to suggest that Liberty Mutual's articulated reasons for its decisions were a pretext for retaliation, particularly in light of the fact that DiBlasi's performance problems preceded her request for FMLA leave. Therefore, the Court should dismiss DiBlasi's FMLA claim.

### C. DiBlasi Cannot Prevail On Her Overtime Claim Because She Was An Exempt Administrative Employee

DiBlasi next alleges that Liberty Mutual failed to pay her "the overtime wages due her," thereby violating the Massachusetts Overtime Law, Mass. Gen. Laws Ch. 151, § 1A, and the FLSA. As discussed below, DiBlasi's claim is meritless because she was employed as a bona fide administrative employee and therefore was exempt from the overtime requirements of both statutes. See 29 U.S.C. § 213(a)(1) (providing that the statutory overtime requirement does not apply to "any employee employed in a bona fide . . . administrative . . . capacity"); Mass. Gen. Laws Ch. 151, § 1A(3) (providing that the statutory overtime requirement does not apply to "any employee who is employed . . . as a bona fide . . . administrative . . . person").

An exempt administrative employee is any employee (1) "[c]ompensated on a salary or fee basis at a rate of not less than $455 per week," (2) "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) "[w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a).[12] See Hines v. State Room, Inc., 665 F.3d 235, 241-42 (1st Cir. 2011). Because DiBlasi satisfies all three of these criteria, her overtime claim is meritless.

**1. Liberty Mutual paid DiBlasi on a salary basis.**

First, it is undisputed that Liberty Mutual paid DiBlasi an annual salary of $88,000 during the course of her employment, which equates to $1692.31 per week and $3384.62 per bi-weekly pay period. See SMF ¶ 104; Complaint ¶ 20. DiBlasi received that salary each pay period, regardless of the number of hours she worked each pay period, and regardless of the quality of her work during that time. SMF ¶ 105. Accordingly, DiBlasi was paid on a "salary basis," thereby satisfying the first element of the administrative exemption. See 29 C.F.R. §§ 541.600, .602 ("An employee will be considered to be paid on a 'salary basis' . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.").

**2. DiBlasi's primary duty was the performance of non-manual work directly related to the general business operations of Liberty Mutual.**

To satisfy the second element of the administrative exemption, DiBlasi must have had a "primary duty" that was "the performance of office or non-manual work directly related to the management or general business operations of" Liberty Mutual or its customers. See 29 C.F.R. § 541.200(a)(2).

As her title (Senior Product Analyst) suggests, DiBlasi's most important job duty was to analyze and research internal data and market trends for personal insurance products in her assigned states to ensure that Liberty Mutual achieved strong results in those states and its products remained competitive. SMF ¶¶ 10, 17-18. See 29 C.F.R. § 541.700(a) ("The term 'primary duty' means the principal, main, major, or most important duty that the employee performs."). Liberty Mutual expected that this analysis would include an evaluation of the causes of, and recommendations on whether and how to respond to, any such trends or changes. See SMF ¶ 106.

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[12] Massachusetts has adopted the definition of the term bona fide administrative employee set forth in the FLSA. See 455 Code of Mass. Regs. § 2.02(3). Therefore, the Court may apply the same analysis under both statutes. See Cash v. Cycle Craft Co., Inc., 508 F.3d 680, 686-87 (1st Cir. 2007) ("The resolution of Cash's Fair Labor Standards Act claim determines his Massachusetts statutory claim.").

Further, DiBlasi performed these tasks in her office at Liberty Mutual or, on occasion, from home. See SMF ¶ 107. Thus, it is clear that DiBlasi's primary duty involved the performance of "office or non-manual work." See 29 C.F.R. § 541.200(a)(2).

Moreover, DiBlasi's duties were "directly related to the management or general business operations of" Liberty Mutual, as is required to satisfy the second element of the administrative exemption. See 29 C.F.R. § 541.201(b). "To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." See 29 C.F.R. §541.201(a); Hines, 665 F.3d at 242-43. Examples of activities that satisfy this standard include "work in functional areas such as . . . auditing . . . quality control . . . research . . . [and] legal and regulatory compliance." 29 C.F.R. §541.201(b).

Liberty Mutual is in the business of designing and selling insurance products and related services to consumers and businesses. SMF ¶ 110. As a Senior Product Analyst, DiBlasi was expected to support Liberty Mutual's business by providing analysis and insight into how the company's products were performing, and how the company could responds to trends, in the market.[13] SMF ¶¶ 108-09. Such market research and analysis clearly constitutes exempt work for purposes of the administrative exemption. See 29 C.F.R. § 541.201(b), (c) (noting that advisors or consultants may qualify for the exemption); Reich v. Haemonetics Corp., 907 F. Supp. 512, 517-18 (D. Mass. 1995) (concluding that Business Analysts who helped their employer's sales personnel analyze and structure deals satisfied the administrative exemption); U.S. Department of Labor Opinion Letter dated April 21, 2008, 2008 DOLWH LEXIS 9, at *4-5 ("The [employee]'s duty of performing standardized tests on company products and preparing reports on how those products compare to competitors' products also directly relates to the functional area of research.").

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[13] DiBlasi neither sold nor designed Liberty Mutual's insurance products. SMF ¶¶ 111-112. Thus, she cannot be considered a non-exempt "production" worker. See Reich v. John Alden Life Ins. Co., 126 F.3d 1, 9 (1st Cir. 1997)

Accordingly, DiBlasi satisfies the second element of the administrative exemption.

**3. DiBlasi exercised discretion and independent judgment with respect to matters of significance.**

To satisfy the third and final element of the administrative exemption, DiBlasi's primary duty "must include the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.202(a). Generally speaking, "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." Id. According to the Department of Labor, in evaluating whether an employee satisfies this element of the administrative exemption, courts should consider all of the facts of a particular case, including "whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; [and] whether the employee provides consultation or expert advice to management." 29 C.F.R. § 541.202(b). It is well established, however, that "employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." 29 C.F.R. § 541.202(c) ("The decisions made

(noting that employees may be non-exempt "where their job is to generate (i.e., produce) the very product or service that the employer's business offers to the public").

as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action.”).

DiBlasi plainly satisfies this test. First, Liberty Mutual legitimately expected that she would exercise discretion and independent judgment by, among other things, researching and analyzing the competitive landscape for personal insurance products in her assigned states and making recommendations regarding whether and how Liberty Mutual should respond to trends in the market. SMF ¶ 109. Second, her advice related to matters of significance, namely Liberty Mutual’s need to stay competitive in the market for personal insurance products. See 29 C.F.R. § 541.202(a) (“The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.”).

To be sure, DiBlasi had difficulty delivering the expected level of analysis on a regular basis; and that failure, as discussed at length above, ultimately led to the termination of her employment. These performance problems, however, do not alter the exempt nature of her expected duties as a Senior Product Analyst. See, e.g., Stein v. J.C. Penney Co., 557 F. Supp. 398, 401-05 (W.D. Tenn. 1983) (“to the extent plaintiff did perform non-exempt duties it was largely a problem of his own creation” and that failure “does not convert an exempt job into a non-exempt one”). See also Moore v. Tractor Supply Co., 352 F.Supp.2d. 1268, 1276-77 (S.D. Fla. 2004) (holding that a store manager was exempt where he spent substantial time performing non-exempt sales, stocking, and customer service functions instead of his numerous managerial responsibilities due to his “difficulty delegating tasks to his team members because they were not able to perform their jobs”).

In light of the foregoing, DiBlasi satisfies all three elements of the administrative exemption. Accordingly, DiBlasi was not entitled to overtime pay under the Massachusetts

Overtime Law or the FLSA. Therefore, the Court should dismiss Counts I and II of her Second Amended Complaint.

## III. CONCLUSION

For the reasons discussed above, there are no genuine disputes of material fact and Liberty Mutual is entitled to judgment as a matter of law on all of DiBlasi's claims. Therefore, the Court should grant Liberty Mutual's motion for summary judgment and dismiss this case in its entirety.

Respectfully submitted,

LIBERTY MUTUAL GROUP INC.

By its attorneys,

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Dated: December 6, 2013

## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2013, a true and accurate copy of the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants.

/s/ Christopher B. Kaczmarek
Christopher B. Kaczmarek

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